SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **18**

Justice

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JOHN DOE,

Plaintiff,

- v -

YESHIVA UNIVERSITY, MARSHA STERN TALMUDICAL ACADEMY - YESHIVA UNIVERSITY HIGH SCHOOL FOR BOYS, PAT DOE 1-30, MEMBERS OF THE BOARD OF TRUSTEES OF YESHIVA UNIVERSITY, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, WHOSE IDENTITIES ARE PRESENTLY UNKNOWN TO PLAINTIFFS, JAMES DOE 1-30, MEMBERS OF THE BOARD OF TRUSTEES OF MARSHA STERN TALMUDICAL ACADEMY - YESHIVA UNIVERSITY HIGH SCHOOL FOR BOYS, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, WHOSE IDENTITIES ARE PRESENTLY UNKNOWN TO PLAINTIFFS,

Defendants.

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INDEX NO. 950012/2020

MOTION DATE 03/04/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 30, 31

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendants Yeshiva University (YU), Yeshiva University High Schools s/h/a Marsha Stern Talmudical Academy-Yeshiva University High School For Boys (YUHS), Pat Doe 1-30, Members of the Board of Trustees of Yeshiva University (the YU Trustees), and James Doe 1- 30, Members of The Board of Trustees of Marsha Stern Talmudical Academy - Yeshiva University High School For Boys (the YUHS Trustees) (collectively, defendants) move to dismiss the complaint pursuant to CPLR 3211 (a) (5), (7), and (11).

Plaintiff alleges that he was a student at YUHS and was sexually abused by George Finkelstein, a school administrator, and Rabbi Macy Gordon, a teacher, between 1976-1977, when plaintiff was approximately fourteen (14) years old. Plaintiff commenced the instant action

pursuant to CPLR 214-g asserting the following causes of action against all defendants: (1) negligent supervision; (2) negligent retention; (3) negligent failure to provide a safe and secure environment; (4) negligence for failure to terminate; (5) negligence for failure to recognize and investigate sexual abuse; and (6) negligence for failure to train relating to child abuse.

Initially, the Court finds that CPLR 214-g enacted under the Child Victims Act (CVA) is not unconstitutional. "[A] claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice" (Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig., 30 NY3d 377, 400 [2017]). Based on the legislative materials describing the purpose and justification for the CVA, this Court agrees with many other courts that have decided that the CVA is a reasonable response to remedy innumerous injustices of past child sexual abuse and does not run afoul of the due process protections afforded by the State Constitution (see PB-36 Doe v Niagara Falls City School Dist., 72 Misc 3d 1052, 1058-60 [Sup Ct, Niagara county 2021]; Kaul v Brooklyn Friends School, index no. 512634/2020, 2022 WL 987843 [Sup Ct, Kings County March 31, 2022] [citing cases]).

In determining dismissal under CPLR Rule 3211 (a) (7), the "complaint is to be afforded a liberal construction" (Goldfarb v Schwartz, 26 AD3d 462, 463 [2d Dept 2006]). The "allegations are presumed to be true and accorded every favorable inference" (Godfrey v Spano, 13 NY3d 358, 373 [2009]). "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part

of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

To state a claim for negligent supervision and/or retention under New York law, a plaintiff must plead, in addition to the elements required for a claim of negligence:[1] (1) the existence of an employee-employer relationship; (2) "that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 161 [2d Dept 1997]; Sheila C. v Povich, 11 AD3d 120, 129-30 [1st Dept 2004]); and (3) "a nexus or connection between the defendant's negligence in [supervising and/or retaining] the offending employee and the plaintiff's injuries" (Roe v Domestic & Foreign Missionary Socy. of the Prot. Episcopal Church, 198 AD3d 698, 701 [2d Dept 2021]; Gonzalez v City of New York, 133 AD3d 65, 70 [1st Dept 2015] ["what the plaintiff must demonstrate is a connection or nexus between the plaintiff's injuries and the defendant's malfeasance"]).

Although defendants claim that the notice or propensity element was insufficiently plead, "[t]here is no statutory requirement" that such cause of action "be pleaded with specificity" (Kenneth R., 229 AD2d at 161). The Court finds that the allegations in the complaint, which are to be taken as true, adequately state this element (see, e.g., NYSCEF Doc no 1 at ¶¶ 9, 10, 26, 33). Discovery from defendants is likely to shed light on this issue and others (see generally Doe v Intercontinental Hotels Group, PLC, 193 AD3d 410, 411 [1st Dept 2021]).

[1] To state a negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (Solomon v City of New York, 66 NY2d 1026, 1027 [1985]).

Defendants argue that the third, fourth, fifth, and sixth causes of action are not cognizable and are otherwise duplicative of the other claims.

The Court declines to dismiss the third cause of action for negligent failure to provide a safe and secure environment. It is well settled that "[s]chools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (Mirand v City of New York, 84 NY2d 44, 49 [1994]). The defendants' "duty to students arises from its physical custody over them. When that custody ceases, and the child passes out of the school's authority such that the parent is free to reassume control, the school's custodial duty ceases" (Colon v Board of Educ. of City of N.Y., 156 AD2d 131 [1st Dept 1989], citing Pratt v Robinson, 39 NY2d 554, 560 [1976]; see Stephenson v City of New York, 19 NY3d 1031, 1034 [2012]). The complaint contains allegations that sexual abuse occurred during school hours and on school property — therefore, the complaint adequately alleges a breach of the duty of care owed to plaintiff under an *in loco parentis* doctrine. Although the same allegations are asserted under the first cause of action for negligent supervision, the Court declines to dismiss the claim because it concerns distinctly different legal duties of care, one between the defendants and the tortfeasors and the other between defendants and the plaintiff (see generally Hamilton v Beretta U.S.A. Corp., 96 NY2d 222, 233 [2001], op after certified question answered, 264 F3d 21 [2d Cir 2001] ["The key in each is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm"]).

The fourth cause of action for negligent failure to retain is duplicative of the second cause of action for negligent retention and shall be dismissed.

The fifth and sixth causes of action, for negligent failure to recognize and investigate sexual abuse and negligent failure to train as it relates to sexual abuse, shall be dismissed as unopposed but also because the Court finds that they attempt to state broader negligence claims that are not cognizable.

"It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff" (Pulka v Edelman, 40 NY2d 781, 782 [1976]). "In the absence of duty, there is no breach and without a breach there is no liability" (id.). As stated above, "[s]chools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (Mirand, 84 NY2d at 49). Failure to provide adequate training regarding sexual abuse is no different — and in this regard, it cannot be said that the school was expected to train its employees or students "regarding all manner of potential criminal or inappropriate behavior by their employees or others" (Higgins v Zenker Corp., 2019 NY Slip Op 30802[U], *7-8 [Sup Ct, Suffolk County 2019]). "Schools are not insurers of safety" (Mirand, 84 NY2d at 49), and this Court declines to extend a duty of care to its students "for failure to train regarding a limitless universe of potential illegal or inappropriate actions by employees, resulting in insurer-like liability on the part of any employer" (Higgins, 2019 NY Slip Op 30802[U] at *7-8). The same applies for the fifth cause of action for negligent failure to recognize and investigate sexual abuse (see, e.g., Kenneth R., 229 AD2d at 163 ["There is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee"]).

Further, that branch of the motion pursuant to CPLR 3211 (a) (7) to dismiss the request for punitive damages is denied. "To recover punitive damages, a plaintiff must show, by clear,

unequivocal and convincing evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives" (Munoz v Puretz, 301 AD2d 382, 384 [1st Dept 2003] [internal citations and quotation marks omitted]). "[P]unitive damages can be imposed on an employer for the intentional wrongdoing of its employees only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, *or deliberately retained the unfit servant* . . . ." (Loughry v Lincoln First Bank, N.A., 67 NY2d 369, 378 [1986] [emphasis added]). As the claims for negligent retention and/or supervision (which include allegations of egregious conduct) have survived the motion to dismiss, it would be premature to dismiss the request for punitive damages.

Finally, defendants claim that the complaint must be dismissed insofar as asserted against the YU Trustees and YUHS Trustees pursuant CPLR 3211 (a) (11) and the Not-for-Profit Corporation (NPC) Law § 720-a, which states in relevant part:

> "[In] an action or proceeding against a trustee . . . no person serving without compensation as a director, officer, key person or trustee of a corporation . . . described in section 501 (c)(3) of the United States internal revenue code shall be liable to any person . . . unless the conduct of such director, officer, key person or trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability."

Upon a motion to dismiss made pursuant to CPLR 3211 (a) (11), "the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law." If so, the next inquiry for the court to determine is "whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm" (id.). Here, the Court finds that the provision is applicable to defendant; however, the complaint fails to contain allegations with respect to any specific trustee and, as such, there cannot be a reasonable probability that any particular trustee's conduct was intentional or constituted gross negligence. Therefore, the

negligence claim is barred by the qualified immunity conferred upon the trustees (see, e.g., Drimer v Zionist Org. of Am., 194 AD3d 641, 643 [1st Dept 2021]; cf. Kamchi v Weissman, 125 AD3d 142, 160-62 [2d Dept 2014]).

Accordingly, it is hereby ORDERED that the branch of the motion to dismiss the complaint insofar as asserted against Pat Doe 1-30, Members of the Board of Trustees of Yeshiva University and James Doe 1- 30, Members of The Board of Trustees of Marsha Stern Talmudical Academy - Yeshiva University High School For Boys pursuant to CPLR 3211 (a) (11) is granted; and it is further

ORDERED that the action is severed and continued against the remaining defendant(s); and it is further

ORDERED that the caption be amended to reflect the dismissal of defendants "Pat Doe 1-30, Members of the Board of Trustees of Yeshiva University, in their official and individual Capacities, whose identities are presently unknown to Plaintiffs" and "James Doe 1- 30, Members of The Board of Trustees of Marsha Stern Talmudical Academy - Yeshiva University High School For Boys, in their official and individual Capacities, whose identities are presently unknown to Plaintiffs" and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that service of this order upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol*

on Courthouse and County Clerk Procedures for Electronically Filed Cases (see section J);[2] and it is further

ORDERED that the branch of the motion to dismiss the fourth, fifth, and sixth causes of action are granted; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that defendants YU and YUHS shall file and serve an answer to the complaint within (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall proceed with discovery pursuant to CMO No. 2, Section IX (B) (1) and submit a first compliance conference order within 60 days from entry of this order.

This constitutes the decision and order of the Court.

12/9/2022
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[2] The *Protocol* is accessible at the "E-Filing" page on the court's website: www.nycourts.gov/supctmanh.